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In the Supreme Court of the United States

OCTOBER TERM, 1989

TEXARKANA NATIONAL BANK, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOHN L. DOUGLAS
General Counsel

MARK I. ROSEN
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

IRA H. PARKER
Senior Attorney
Federal Deposit Insurance Corporation
Washington, D.C. 20429

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JESTION PRESENTED

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Duhme & Co. v. *FDIC*, 315 U.S. 447
serting a setoff against the Federal
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audulently induced to purchase loan
m an insured bank.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 874 F.2d 264. The memorandum opinion of the district court (Pet. App. 1b-32b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1989. Petitioner's petition for rehearing was denied on July 19, 1989 (Pet. App. 44a). The petition for a writ of certiorari was filed on October 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, establishes a regulatory scheme designed to protect depositors in federally insured banks. To promote safe and sound banking practices and to implement the deposit insurance program, the Act gives broad powers to the Federal Deposit Insurance Corporation (FDIC or Corporation). See 12 U.S.C. 1811, 1818. Among its other responsibilities, the FDIC, when requested by state banking authorities, acts as a receiver for a failed state bank. 12 U.S.C. 1823(e). The FDIC may liquidate the failed bank to meet the insurance obligations to depositors (12 U.S.C. 1821(f) and (g)); alternatively, the FDIC may enter into a "purchase and assumption" transaction (12 U.S.C. 1823(c)).

In a typical purchase and assumption transaction, the FDIC, acting as receiver of a failed bank, contracts to have a healthy bank purchase the failed bank's acceptable assets and to assume its deposit liabilities. The receiver separately contracts to have the Corporation infuse cash into the assuming bank and acquire those assets not purchased by the healthy bank. A purchase and assumption transaction is often preferable because it avoids the disruption to depositors that a straight liquidation would cause. The FDIC then seeks to minimize the losses to the insurance fund by attempting to collect on the assets transferred to it by the receiver. See *Gunter* v. *Hutcheson*, 674 F.2d 862, 865-866 (11th Cir.), cert. denied, 459 U.S. 862 (1982).

2. On July 27, 1982, the Texas Commissioner of Banking declared Guaranty Bond State Bank (Guaranty) insolvent, and, the next day, appointed the

FDIC as receiver. After quickly evaluating the assets and liabilities of the failed bank, the FDIC entered into a purchase and assumption transaction with a newly organized bank, the First Bank & Trust Company of Redwater, Texas (First Bank). In connection with that transaction, the FDIC provided $11,640,330 to be paid to First Bank and acquired the assets of Guaranty not transferred to First Bank. Pet. App. 2a-3a.

Among the assets acquired by the Corporation were several claims that Guaranty had against petitioner Texarkana National Bank (Texarkana). Those claims arose from: (1) two certificates of deposit that Guaranty had purchased from Texarkana; (2) Guaranty's pro rata share of certain repayments of loans originated by Texarkana, in which Guaranty had participated; and (3) the unused part of an initial fee paid by Guaranty to Texarkana in order to use Texarkana's automatic teller system over a five-year period (the ATM agreement). Pet. App. 3a.

3. In July 1986, the FDIC commenced an action against Texarkana in district court seeking to collect on the assets described above. In its defense, Texarkana asserted that it did not owe any funds to the FDIC. Texarkana claimed that it had extinguished its obligations by exercising (on August 3, 1982, effective July 27, 1982) a unilateral setoff based on claims that Texarkana had against Guaranty. In particular, Texarkana contended that Guaranty had owed Texarkana funds because of the following arrangements and transactions: (1) Texarkana's purchase from Guaranty of two $100,000 participations in loans that were purportedly made to Adam D. Bell and Cecil H. Gunther, but which were actu-

ally fictitious; (2) Texarkana's purchase of subordinated debentures from Guaranty in the aggregate amount of $100,000, maturing in 1984; and (3) Texarkana's purchase of thirteen valid participations in loans originated by Guaranty.[1] Pet. App. 4a. Texarkana also counterclaimed for additional funds under the ATM agreement and for its share of the proceeds of a trustee's sale of property securing another loan originated by Guaranty in which Texarkana had participated. *Id.* at 4a-5a, 23a-25a.

4. The district court entered judgment for Texarkana on all issues (Pet. App. 1b-32b), reciting Texarkana's proposed findings and conclusions virtually verbatim (*id.* at 6a). The court specifically approved the setoff exercised by Texarkana with respect to the fictitious Bell and Gunther loans. The court found, as to the Bell loan, that Guaranty's president had "represented to [Texarkana] that a loan of $127,500.00 was made by [Guaranty] to Adam D. Bell and that the signature[] on the loan documents, security agreements and supporting documents was the signature of Adam D. Bell" (*id.* at 11b-12b); that those "representations were misrepresentations of material facts and were made with the intention to induce [Texarkana] to purchase a participation in

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[1] A loan participation is "an arrangement in which a bank makes a loan to a borrower and then sells all or a portion of that loan to a purchasing bank. All documentation of the loan is drafted in the name of the selling bank. Generally, the purchasing bank's share of the participated loan is evidenced by a certificate which assigns an interest in the loan and any related collateral." Comptroller of the Currency, Administrator of National Banks, *Loan Participations by National Banks, OCC Policy Guidelines*, 4 Fed. Banking L. Rep. (CCH) ¶ 60,799, at 38,858 (Aug. 2, 1984) [hereinafter *OCC Policy Guidelines*].

the Adam D. Bell loan" (*id.* at 12b); and that Texarkana relied on the representations to its detriment in purchasing the loan participation (*ibid.*). The court entered essentially identical findings concerning Guaranty's representations about the fictitious loan to Cecil H. Gunther. *Id.* at 13b.

On the basis of these findings, the court concluded that the "statements" of Guaranty's president that the signatures of Bell and Gunther appeared on the loan documents, and that the president had personally inspected the collateral, were "material and fraudulent, and were intended to and did induce [Texarkana] into purchasing participations in the respective fraudulent loans." Pet. App. 21b-22b. Consequently, the court concluded that Texarkana enjoyed a right to rescind the loan participations because of Guaranty's fraud, and that Texarkana's setoff was timely accomplished. *Id.* at 22b-23b.[2]

5. a. The court of appeals reversed. Relying on *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), the court held that Texarkana was barred from asserting a setoff against the FDIC based on Guaranty's fraudulent inducement of Texarkana to participate in the Bell and Gunther loans.

In *D'Oench, Duhme*, this Court applied federal common law to hold that a maker cannot defend against the FDIC's enforcement of a promissory note it has acquired in a purchase and assumption transaction when the maker has "lent himself to a scheme

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[2] The court also upheld the setoff with respect to the thirteen valid loan participations (Pet. App. 23b-24b) and the subordinated debentures (*id.* at 24b), and ruled against the FDIC on Texarkana's ATM agreement claims and on Texarkana's claim to its proportional share of the proceeds of the trustee's sale. *Id.* at 29a-31a.

or arrangement whereby the banking authority * * * was or was likely to be misled." 315 U.S. at 460. In applying *D'Oench* here, the court of appeals turned to principles reflected in the "statutory codification of *D'Oench, Duhme* at 12 U.S.C. 1823(e)." Pet. App. 10a. The court observed that Section 1823(e) renders invalid against the FDIC any "agreement which tends to diminish or defeat the right, title or interest of the Corporation in any assets acquired by it under this section," unless the agreement is in writing and meets specific approval and record-keeping requirements.[3] The court reasoned that the validity of Texarkana's claim against the FDIC turned on whether Texarkana was relying on an unwritten "agreement" in the sense used by Section 1823(e). Pet. App. 10a-11a.

The court held that Texarkana's claim did depend on such an unwritten agreement. In reaching that conclusion, the court noted that *Langley* v. *FDIC*, 484 U.S. 86 (1987), had applied Section 1823(e) to preclude a maker's defense against the FDIC based on a bank's oral, fraudulent representations about property to be purchased with the proceeds of the maker's note. The court of appeals found "no relevant distinction" between the instant case and *Langley*. As in *Langley*, the court noted, Texarkana relied on a

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[3] Section 1823(e) as originally enacted (Federal Deposit Insurance Act, ch. 967, § 2(13), 64 Stat. 888 (1950)) applied to the FDIC acting in its corporate capacity, not to the FDIC as receiver. The provision was amended in the Financial Institutions Reform, Recovery, and Enhancement Act of 1989, Pub. L. No. 101-73, § 217(4), 103 Stat. 256-257, to extend its coverage to the FDIC acting as a receiver, and to make minor wording changes. These changes are not relevant to the issues involved in the instant petition.

claim of fraud in the inducement by Guaranty; Texarkana, however, "failed to get the representations in writing." Consequently, the court held, "*D'Oench, Duhme*, as codified in § 1823(e), bars [Texarkana] from asserting a setoff based on those representations." Pet. App. 12a-13a.

The court rejected Texarkana's argument that the bank examiners stood to be misled not by Texarkana's actions in purchasing loan participations, but by the underlying fraudulent loans. The court pointed out that this analysis ignores that Texarkana had "participated in an arrangement likely to mislead FDIC" when it had relied on unrecorded representations that were not available for the bank examiners to inspect. Pet. App. 13a.[4]

b. Judge Williams dissented from the majority's application of *D'Oench, Duhme*. Pet. App. 28a-32a. He contended that Texarkana had purchased its participations after the fraudulent scheme had been completed and, therefore, had not "contributed to the concealed deceptive scheme." *Id.* at 30a. Judge Williams also criticized the majority's analysis of the case as involving an unwritten agreement within the meaning of Section 1823(e). In his view, the requirement that a participating bank obtain written statements that "representatives [*sic*] were not fraudulent"

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[4] The court also upheld the FDIC's position on the setoff based on the subordinated debentures (Pet. App. 14a-20a), and ruled for the FDIC regarding Texarkana's additional claims under the ATM agreement (*id.* at 21a-23a) and the trustee's sale of property (*id.* at 23a-27a). The court noted that although the FDIC disagreed with the setoff procedure invoked by Texarkana regarding the valid loan participations, the FDIC did not challenge Texarkana's right to those funds (*id.* at 4a-5a n.2). Petitioner does not press claims in this Court relating to these issues. Pet. 7 n.2.

would produce only a " 'boilerplate' written form," which would not enhance Texarkana's claim that it was without knowledge of the fictitious loans. Pet. App. 31a-32a.

ARGUMENT

1. Petitioner contends (Pet. 22-34) that the court of appeals, in holding that petitioner's setoff based on the fictitious Bell and Gunther loan participations was invalid, misapplied the principles articulated in *D'Oench, Duhme*. That contention is without merit.

a. *D'Oench, Duhme* establishes a broad principle to protect the integrity of assets that the FDIC acquires in transactions involving failed banks. In *D'Oench*, the FDIC brought a collection action based on a note that the FDIC had acquired after a purchase and assumption transaction. The maker of the note had sold a bank bonds that went into default; to enable the bank not to show the past-due bonds on its books, the maker gave the bank a note with the agreement that the bank would not call it for payment. The agreement, however, was contained only in a receipt given to the maker. The books of the bank contained no reference to it. 315 U.S. at 454. Relying on the "federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the * * * assets in the portfolios of the banks which [the FDIC] insures," the Court held that the maker of the note was barred from asserting against the FDIC the bank's agreement not to enforce the note. 315 U.S. at 457, 460-461. The Court found it "sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to be misled." *Id.* at 460.

The principle underlying *D'Oench*—that the FDIC requires protection against unrecorded arrangements that impair the ability of regulators to assess a bank's financial condition—is not limited to the facts of that case. *D'Oench* has been applied to preclude a loan guarantor's defense that a bank had orally agreed to hold the loan proceeds in an account and permit withdrawals only with the guarantor's consent, *FirstSouth, F.A.* v. *Aqua Constr., Inc.*, 858 F.2d 441, 442 (8th Cir. 1988), or that a bank had misrepresented that an unrestricted guarantee would apply only to certain interim financing arrangements, *FDIC* v. *Cardinal Oil Well Servicing Co.*, 837 F.2d 1369, 1372 (5th Cir. 1988). Indeed, *D'Oench* bars the defense of a maker who is the victim of a fraud, but has acted recklessly in allowing the fraud to occur. *FDIC* v. *McClanahan*, 795 F.2d 512 (5th Cir. 1986) (holding liable a maker who was reckless in signing a blank note and leaving it with an untrustworthy bank officer after being told that the loan was denied).[5]

In its recent, unanimous decision in *Langley* v. *FDIC*, *supra*, this Court made clear that *D'Oench* applies when a party's participation in a transaction with a bank was procured by the bank's oral fraud in the inducement. In *Langley*, the Court held that Section 1823(e) bars the defense of an obligor that

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[5] Cf. *FDIC* v. *Investors Assocs. X, Ltd.*, 775 F.2d 152, 156 (6th Cir. 1981) ("*D'Oench* estops the maker of a note from asserting *any* defense arising out of [a] fraudulent scheme, including representations made by another participant in the scheme."); *FDIC* v. *Berr*, 643 F. Supp. 357 (D. Kan. 1986); *FDIC* v. *Timbalier Towing Co.*, 497 F. Supp. 912, 922 (N.D. Ohio 1980); *British Columbia Inv. Co.* v. *FDIC*, 420 F. Supp. 1217, 1224 (S.D. Cal. 1976).

he was fraudulently induced by the bank's oral, factual misrepresentations to sign a note. Observing that Section 1823(e) bars the enforcement of any unwritten agreement that impairs the FDIC's interest, the Court rejected the argument that the term "agreement" does not include factual misrepresentations, the truth of which is a condition to performance by the obligor. The Court explained that excluding such unwritten conditions from Section 1823(e) would not only depart from the ordinary understanding of the meaning of an "agreement" and impair the goal of protecting the reliability of bank records; it would also conflict with *D'Oench, Duhme*, "the leading case in this area prior to enactment of § 1823(e) in 1950." 484 U.S. at 92. The Court said:

> Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact.

484 U.S. at 93.[6]

Against that background, the court of appeals properly applied *D'Oench, Duhme* to invalidate peti-

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[6] As the courts of appeals have uniformly recognized, Congress's enactment of Section 1823(e) does not deprive courts of their continuing authority to fashion rules, under *D'Oench* and federal common law, governing the type of claims that may be asserted against the FDIC in its corporate capacity. See *FDIC* v. *McClanahan*, 795 F.2d at 514 n.1; *FDIC* v. *Investors Assocs. X, Ltd.*, *supra*; *Gunter* v. *Hutcheson*, *supra*. Indeed, petitioner does not dispute this authority.

tioner's unilateral setoff of obligations it owed to the FDIC.[7] Petitioner's claim to a setoff rests on the theory that petitioner was fraudulently induced to purchase the loan participations by the representations of Guaranty's president that: (a) the signatures of Bell and Gunther appeared on the loan documents, and (b) the president had personally inspected the collateral. But, as the court of appeals put it, petitioner "failed to get the representations in writing." Pet. App. 12a-13a. That failure precluded bank examiners from having available to them the full scope of information needed to complete an evaluation of the bank's assets. Petitioner's contentions, if accepted, would subject Guaranty's balance sheet to a significant but invisible footnote, reflecting petitioner's claim of the right to exercise a unilateral setoff if unwritten representations made by Guaranty's officers proved false. The bank examiners never had the opportunity to study and evaluate that claim; consequently, the court of appeals properly refused to allow its assertion in post-insolvency litigation against the FDIC.[8]

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[7] The court of appeals did not, as petitioner states (Pet. 34-48), apply Section 1823(e) of its own force to the transactions in this case. Rather, the court held that "[s]etoff was not appropriate on the [fraudulent] loans because of the *D'Oench, Duhme* Doctrine." Pet. App. 27a. The court's consideration of *Langley* and Section 1823(e) while applying the "scheme or arrangement" test of *D'Oench* was entirely correct (see note 6, *supra*).

[8] Petitioner could easily have preserved the claim it asserts now by taking the step of reducing the material terms of the representations on which it relied to writing and having them recorded in the bank's records. Compare *FSLIC* v.

Petitioner continues to insist (Pet. 27-28) that it relied only on written representations in asserting its right to a setoff. That contention is belied by the district court's own findings; in particular, the finding that Guaranty's president represented that the signatures on the loan documents were those of Bell and Gunther (Pet. App. 12b-13b, 21b-22b)—a representation that petitioner never says appeared in writing. In any event, petitioner's analysis of the case was rejected by the court of appeals, which specifically stated that petitioner failed to get the crucial representations in writing (*id.* at 12a-13a). While the court of appeals' statement appears to rest on inferences from the findings of fact with which petitioner disagrees, any quarrel about the court of appeals' reasoning in that regard is entirely factbound and does not warrant this Courts' review.

b. The judgment below is also correct for an independent reason that the court of appeals did not reach: under the particular circumstances, petitioner exhibited a lack of due care in purchasing the loan participations from Guaranty without conducting any background investigation or routine credit check. In the context of this case, petitioner's conduct constituted the type of scheme or arrangement that is

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Two Rivers Assocs., 880 F.2d 1267, 1274 (11th Cir. 1989); *Chatham Ventures, Inc.* v. *FDIC*, 651 F.2d 355, 363 n.16 (5th Cir. 1981), cert. denied, 456 U.S. 972 (1982). Requiring statements to be reduced to writing and placed in the bank's loan files would not be mere "boilerplate" (Pet. App. 31a (Williams, J., dissenting)), but could very well have provided a clue for bank examiners to conduct a more searching inquiry into the transactions.

likely to mislead bank examiners, and the setoff is properly barred by *D'Oench*.[9]

Petitioner, a national bank, purchased two $100,000 participations from Guaranty on the same day. Each of these participations was significantly larger than any individual participation it had previously purchased from Guaranty, which was a small rural bank in East Texas. See Pet. App. 8b-12b. Petitioner evidently did not perform any credit checks concerning the purported borrowers, despite the suspicious nature of the round-number offerings and their unprecedented size. A simple phone call to the borrowers would have revealed that the loans were shams; yet, this was not done. Petitioner's conduct plainly fell short of standards embodied in the Comptroller of the Currency's longstanding policy regarding loan participations: a national bank must apply the same standards of credit review to a loan participation as to a loan made by the bank itself. See *OCC Policy Guidelines*, 4 Fed. Banking L. Rep. (CCH) ¶ 60,799, at 38,858.[10]

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[9] The district court entered a conclusory finding that petitioner's reliance on Guaranty's misrepresentations was "justified." Pet. App. 22b. On appeal, the FDIC challenged that finding as contrary to the evidence that Texarkana had ignored "red flags" about the suspect nature of the two $100,000 loan participations, see FDIC C.A. Br. 16-19, and contended that petitioner's conduct was properly viewed as involvement in a "scheme or arrangement" under *D'Oench*, *id.* at 13-16. The court of appeals did not address the argument because of its holding regarding petitioner's reliance on unwritten representations.

[10] The *OCC Policy Guidelines*, though issued in 1984 (after the transactions here), explicitly reaffirmed the Comptroller's prior policy regarding the requirement of prudence in loan participations. The guidelines were designed to provide more

By ignoring ordinary commercial measures designed to protect against losses, petitioner assisted Guaranty in booking a significant, hidden liability: petitioner's claim to a right of repayment of the loan participations at the expense of the FDIC.[11] Petitioner's failure to exercise prudent lending practices amounted to participation in an arrangement tending to mislead the bank examiners. Certainly, if the negligence of an individual borrower regarding the prospect of a bank's fraud can result in liability to the FDIC, cf. *McClanahan*, 795 F.2d at 516, the same is true of petitioner, a sophisticated commercial enterprise operating in a highly regulated environment. Petitioner, therefore, cannot insist that the *D'Oench* doctrine be relaxed to afford it an opportunity to shift its loss to the FDIC and the nationwide deposit insurance fund.

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specific insight into the Comptroller's views, in particular, that the "purchasing bank must perform a complete analysis of the credit quality of the obligations to be purchased, document the obligations, thoroughly analyze collateral, and maintain complete and current credit information on the borrower throughout the term of the loan." The Comptroller explained that a "prudent purchaser needs full credit information on an obligor to make an informed and independent evaluation of the credit." 4 Fed. Banking L. Rep. (CCH) ¶ 60,799, at 38,858-38,859.

[11] Petitioner's contention (Pet. 27) that the fraud was complete at the moment that the false loan documents were created, and, therefore, that petitioner did not lend itself to any deceptive scheme, is without merit. This argument ignores the reality that the fictitious loans would have been of no use to Guaranty absent the infusion of $200,000 cash from petitioner. The addition of those funds to Guaranty's books, subject to a future, undisclosed setoff, formed an integral part of a scheme that was likely to mislead bank examiners.

2. Petitioner next contends (Pet. 21, 31-34) that the decision below conflicts with *FDIC* v. *Meo*, 505 F.2d 790 (9th Cir. 1974), and *FDIC* v. *Turner*, 869 F.2d 70 (6th Cir. 1989). That assertion is incorrect. Each of those decisions simply concluded, on distinguishable facts, that a person did not lend himself to a scheme or arrangement having the potential to mislead regulators.

In *Meo*, the defendant gave a promissory note to a bank on the understanding that the funds would be used to purchase shares of the bank's stock; the bank, however, failed to do so. After the bank's demise, the FDIC sued to enforce the note. The court of appeals rejected the FDIC's reliance upon *D'Oench* to cut off the maker's defense of failure of consideration. The court, strongly emphasizing factors that are absent in this case, stated that "Meo is innocent of any wrongdoing or negligence," and held that "a bank borrower who was neither a party to any deceptive scheme involving, nor negligent with respect to, circumstances giving rise to the claimed defense to his note is not estopped from asserting such defense against the bank's receiver." 505 F.2d at 793. *Meo* does not govern a case in which a party has lent himself to a scheme that is capable of misleading the bank examiners—as is the case here.[12] Moreover, the Ninth Circuit has been reluctant to extend *Meo* beyond its distinctive facts. See *FDIC* v. *Bank of San Francisco*, 817 F.2d 1395, 1399 (9th Cir. 1978);

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[12] Indeed, the Fifth Circuit has cited *Meo* with approval. See *McClanahan*, 795 F.2d at 515 (discussing *Meo* and noting that a maker is not estopped from asserting that his signature was forged or that the bank failed to perform bilateral obligations expressed in the note).

FDIC v. *First Nat'l Fin. Co.*, 587 F.2d 1009, 1012 (9th Cir. 1978).

Nor does the decision below conflict with *FDIC* v. *Turner*, *supra*. In that case, Turner, at the insistence of the president of Turner's bank, signed a blank, continuing guaranty of obligations of entities Turner controlled. The document was then altered (by unknown persons) to reflect a guaranty of obligations at a different bank and on behalf of a different debtor. Although the court agreed (869 F.2d at 276) that "executing an instrument in blank leads to deceptive schemes," the court distinguished Turner's actions because an essential term of Turner's guaranty (the bank to which the guaranty ran) was altered by the fraudulent conduct of others (who blotted out the name of the bank with correction fluid and inserted a different name). In that setting, the court permitted Turner's defense because a significant fraud intervened between Turner's actions and the completion of the instrument on which the FDIC sued. 869 F.2d at 275.

The facts addressed by the court in *Turner* bear scant resemblance to the situation here. To the contrary, the Sixth Circuit emphasized that "Turner is not defending his position based on any oral agreement." 869 F.2d at 275. The court made no suggestion that it would extend its holding to cases of fraud in the inducement that do rely on oral representations. Cf. *id.* at 275-276 (citing *FDIC* v. *Morrison*, 816 F.2d 679 (6th Cir. 1987) (Table); *FDIC* v. *Hatmaker*, 756 F.2d 34 (6th Cir. 1985)). Nor did the court imply that it would excuse careless conduct that directly produces misleading information on the

books of the bank, as was true with regard to petitioner's conduct.

3. Petitioner offers a lengthy argument (Pet. 35-48) purporting to demonstrate that 12 U.S.C. 1823(e) does not bar the setoff based on the Bell and Gunther loans. That contention does not warrant this Court's review. First, as we have pointed out (note 7, *supra*), because the court of appeals relied on the *D'Oench* doctrine, it did not apply Section 1823(e) by its own terms to bar petitioner's setoff. Second, petitioner concedes that its entire argument regarding Section 1823(e) "assumes that *D'Oench*, *Duhme* will not apply to bar [petitioner's] setoff claim against FDIC-Receiver" (Pet. 44 n.8). Cf. *Beighley* v. *FDIC*, 868 F.2d 776, 784-785 n.12 (5th Cir. 1989). Because the court of appeals properly applied *D'Oench*, and because its holding on that point does not warrant review, there is no reason for this Court to address issues arising under Section 1823(e) that were not reached by the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOHN L. DOUGLAS
General Counsel

MARK I. ROSEN
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

IRA H. PARKER
Senior Attorney
Federal Deposit Insurance Corporation

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